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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SAN JOSE WATER COMPANY (U 168 W) for an Order Approving the Sale of the Main Office under Section 851 and Authorizing the Investment of the Sale Proceeds under Section 790.

Application 07-01-035
(Filed January 22, 2007)

**ADMINISTRATIVE LAW JUDGE'S RULING
SUSPENDING PROCEEDING SCHEDULE**

Background

During the prehearing conference held in Application (A.) 07-01-035 (Application) on March 16, 2007, I stated that Decision (D.) 06-05-041 addressed the gain on sale of utility property, and in particular, water utility gains on sale and the reinvestment of sales proceeds under Pub. Util. Code § 790.¹ It also established application and tracking requirements for that purpose. I noted that San Jose Water Company's (SJWC) Application did not mention D.06-05-041, and stated that the assigned Commissioner's scoping ruling would likely ask parties to address whether D.06-05-041 applied to SJWC's proposed transaction, and if so, whether SJWC's Application satisfied the requirements of that decision. I also pointed out the apparent contradiction between SJWC filing its Application

¹ TR. pp. 13-14.

under § 851,² which applies to property that's necessary or useful, while asking the Commission in that Application to deem the property in question to be no longer necessary or useful.

Counsel for SJWC stated she believed that SJWC could not decide on its own that the property was no longer necessary or useful.³ Counsel for SJWC stated she understood that SJWC was required to file the application pursuant to § 851 to seek a decision by the Commission that SJWC's main office is no longer necessary or useful, allowing SJWC to sell the property and to reinvest the proceeds of that sale pursuant to § 790. Counsel for SJWC further stated she believed the Commission issued a decision on this issue, and agreed to provide a citation to that decision.

The March 30, 2007 Assigned Commissioner's Scoping Memo and Ruling (ACR Scoping Memo), among other things, identified the issues of whether D.06-05-041 applied to the SJWC transaction and whether SJWC's Application was appropriately filed pursuant to § 851, as issues for consideration in this proceeding. According to the ACR Scoping Memo:

"San Jose Water stated that it believed the company could not decide on its own whether property was no longer necessary or useful, but that it must file an application pursuant to § 851. San Jose Water represents that it is required to ask for a Commission finding under § 851 that the main office is no longer necessary or useful. San Jose Water's supplemental testimony and [the Division of Ratepayer Advocates' (DRA's)] testimony shall address this issue.

² All statutory references are to the Public Utilities Code, unless otherwise noted.

³ TR. pp. 14-15.

D.06-05-041, among other things, addressed water-company gains on sale and the reinvestment proceeds under § 790, and established tracking and application requirements for that purpose. D.06-05-041 requires water companies to provide the Director of the Water Division [and the Director] of the Division of Ratepayer Advocates 30 days' advance written notice whenever they plan to sell land, buildings, water rights, or all or part of a water system. This notice requirement applies to water company assets that the company believes are no longer used and useful, and does not preclude later review of such sales in a water company's GRC or a later proceeding. San Jose Water's supplemental testimony and DRA's testimony shall address the applicability of D.06-05-041 to this application."⁴

The ACR Scoping Memo established April 30, 2007, as the deadline for SJWC to serve its supplemental testimony, and June 8, 2007, for DRA to serve its testimony. SJWC requested by electronic mail on April 30, 2007, a one-week extension of time until May 7, 2007, to submit its supplemental testimony, and sought clarification that its filing on legal issues should be in the form of a brief. No other party objected to the request. Assistant Chief Administrative Law Judge (ALJ) Cooke granted the request via email on April 30, 2007, and clarified that SJWC's filing on legal issues should be in the form of a brief.

SJWC made a second request by email on May 7, 2007, for another extension of time until Friday, May 11, 2007, to submit its brief on legal issues. No other party objected to the request, but the Division of Ratepayer Advocates (DRA) sought clarification that DRA could include its response to legal and other issues in the proceeding in its evidentiary testimony to be served on June 8, 2007.

⁴ March 30, 2007 Scoping memo and Ruling of Assigned Commissioner, pp. 4-5 (footnote omitted).

No party objected to DRA's request. I granted SJWC's request for additional time via email on May 7, 2007, and clarified that DRA's response to legal and other issues in the proceeding may be included in its evidentiary testimony to be filed on June 8, 2007.

SJWC served supplemental testimony on May 7, 2007, concerning the purchase of a new facility. However, it again requested an extension of time until Friday, May 11, 2007, to file its brief on the legal issues identified in the March 30, 2007 ACR Scoping Memo and summarized above. SJWC's request was granted via email on May 7, and confirmed by ALJ ruling on May 8.

SJWC did not submit its brief by the May 11, 2007 deadline, nor did it explain why it failed to meet the established deadline or to ask for another extension of time. On May 29, 2007, I asked Counsel for SJWC via email for status on the filing of SJWC's brief. Counsel responded that she misunderstood the May 7, 2007 ALJ ruling granting an extension of time, and requested yet another extension of time until June 4, 2007 to submit the brief. In response, DRA requested an extension of time until June 15, 2007 to serve its report and testimony. Both requests were granted via email on June 1, 2007. However, again, SJWC did not submit its brief by the established June 4, 2007 deadline, nor explain why it failed to meet the deadline or to ask for additional time.

Discussion

The issues of whether D.06-05-041 applies to SJWC's proposed transaction, and if so, whether SJWC's Application satisfied the requirements of that decision are threshold questions. If D.06-05-041 applies to SJWC's proposed transaction, and if SJWC's Application does not comply with D.06-05-041, the Application must be dismissed. Also, if SJWC is not required to file its Application under § 851 but instead follow another established procedure for selling and

reinvesting utility property that is no longer necessary or useful, the Application must be dismissed.

Although it appeared to me that D.06-05-041 applies to SJWC's proposed transaction, I wanted to ensure the Applicant had an opportunity to explain why my reading of D.06-05-041 was incorrect. SJWC has failed to do so. SJWC has also failed to provide a citation to the decision upon which it claims requires SJWC to file an application pursuant to § 851 to seek a decision by the Commission that SJWC's main office is no longer necessary or useful.

D.06-05-041 states,

"Section 851 gives us discretion to review [applications for approval to sell property]. By the same token, we are persuaded that requiring a § 851 application for every sale would be cumbersome...We modify the decision to require that water companies regulated by this Commission provide 30 days' advance written notice to the Director of the Commission's Water Division, as well as to the Director of ORA (now DRA) when they propose to sell land, water rights, buildings, or all or a portion of a water system that they determine are no longer used or useful. This notice will give the Commission the opportunity to respond to the proposed sale and prevent sales of property that is obviously used and useful."⁵

D.06-05-041 contains the following Conclusions of Law:

"Water utilities may not pay out sales proceeds in dividends or other profit to shareholders. Rather, they must place the proceeds in a memorandum account approved by the Commission and meet the other tracking requirements we imposed in D.03-09-021 and reiterate here." (Conclusions of Law 27.)

⁵ D.06-05-041, p. 84.

“We should impose certain reporting and application requirements to ensure that water companies act in compliance with § 790 and invest sales proceeds from formerly used and useful utility property into new infrastructure.” (Conclusions of Law 28.)

“Because the Infrastructure Act may incent water companies to sell used and useful property prematurely, safeguards against “churning” are appropriate.” (Conclusions of Law 29.)

Ordering Paragraph 17 of D.06-05-041 states:

“Because the Infrastructure Act may give water companies incentives to sell used and useful real property prematurely, safeguards against ‘churning’ are appropriate. All water utilities we regulate shall comply with the following requirements in accordance with the Infrastructure Act:

Track all utility property that was at any time included in rate base and maintain sales records for each property that was at any time in rate base but which was subsequently sold to any party, including a corporate affiliate.

Obtain Commission authorization to establish a memorandum account in which to record the net proceeds from all sales of no longer needed utility property.

Use the memorandum account fund as the utility's primary source of capital for investment in utility infrastructure.

Invest all amounts recorded in the memorandum account within eight years of the calendar year in which the net proceeds were realized.”

Ordering Paragraph 19 of D.06-05-041 (as modified by D.06-11-001) states:

“Water companies shall provide the Director of the Water Division and the Director of the Division of Ratepayer Advocates 30 days’ advance written notice whenever they plan to sell land, buildings, water rights, or all or part of a water system. This notice

requirement applies to water company assets the company believes are no longer used and useful. The 30 days' advance notice will give the Commission an opportunity to assess whether companies are selling off key portions of their asset base. Notice will not preclude later review of such sales in a water company's GRC or a later proceeding. The notice shall include the following heading in at least 16 point bold type: 'Notice under Rulemaking 04-09-003. Commission staff must respond within 30 days.' The notice must include the name, address, phone and email address of the potential purchaser(s). If the Commission staff objects to the proposed sale, it may send an objection in any form to the seller and proposed purchaser(s). Mailing of such an objection shall prevent the proposed purchaser from claiming it is a bona fide purchaser of the property at issue until the issues raised in the objection are resolved."

D.06-05-041 explicitly provides that the sale of water utility property does not require an § 851 application, and Ordering Paragraphs 17 and 19 provide clear directions for how water utilities must proceed. D.06-05-041 requires water companies regulated by this Commission to provide 30 days' advance written notice to the Director of the Commission's Water Division, as well as to the Director of ORA (now DRA) when they propose to sell land, water rights, buildings, or all or a portion of a water system that they determine are no longer used or useful.

I conclude that D.06-05-041 applies to the transaction that is the subject of A.07-01-035, and that SJWC's Application does not comply with D.06-05-041. SJWC has provided nothing to support a different conclusion. Therefore, the schedule in this proceeding is suspended, and I will prepare a proposed decision to dismiss the Application.

IT IS RULED that the schedule in this proceeding is suspended.

Dated June 15, 2007, at San Francisco, California.

/s/ RICHARD SMITH

Richard Smith
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a copy of the Notice of Availability to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the copy of the Notice of Availability is current as of today's date.

Dated June 15, 2007, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

***** SERVICE LIST *****

Last Update on 11-MAY-2007 by: JVG
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